IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

EVANSTON INSURANCE COMPANY,	§	
	§	
Plaintiff,	§	
	§	
v.	§	No. 3:16-cv-2626
	§	
THE ALDEN ROOFING COMPANY,	§	
LLC, OMAR SOTO, JOSE VALDEZ-	§	JURY DEMAND
AREVALO, and CAROLINA GARCIA,	§	
	§	
Defendants.	§	

EVANSTON INSURANCE COMPANY'S COMPLAINT
AND REQUEST FOR DECLARATORY JUDGMENT

Plaintiff Evanston Insurance Company, successor by merger to Essex Insurance Company, ("Evanston") files this complaint and request for a declaratory judgment against defendants The Alden Roofing Company, LLC ("Alden Roofing"), Omar Soto ("Soto"), Jose Valdez-Arevalo ("Valdez-Arevalo"), and Carolina Garcia ("Garcia") and in support thereof would respectfully show the following:

I.
PARTIES

1. Plaintiff Evanston Insurance Company, successor by merger to Essex Insurance Company, is an Illinois corporation that maintains its principal place of business in Illinois.

2. Defendant The Alden Roofing Company, LLC is a Texas limited liability company. Its sole members, Joshua C. Knox and Melanie C. Knox are both individuals residing in Travis County, Texas and are citizens of Texas. Alden Roofing may be served with process by serving its registered agent, Joshua C. Knox at 1312 Shotgun Court, Pflugerville, Texas 78660.

3. Defendant Omar Soto is an individual residing in Hunt County, Texas and, upon information and belief, a citizen of Texas. He may be served with process at his last known address of 418 S. Preston Street, Wolfe City, Texas, 75496.

4. Defendant Jose Valdez-Arevalo is an individual residing in Denton County, Texas and, upon information and belief, a citizen of Texas. Valdez-Arevalo may be served with process through his counsel, Jesse R. Showalter and Juan C. Hernandez, HERNANDEZ, BROWNING & SHOWALTER, 8111 LBJ Freeway, Suite 1065, Dallas, Texas 75251. Valdez-Arevalo is joined as an interested-party defendant given his financial interest in the outcome of this coverage dispute.

5. Defendant Carolina Garcia is an individual residing in Denton County, Texas and, upon information and belief, a citizen of Texas. Garcia may be served with process through her counsel, Jesse R. Showalter and Juan C. Hernandez, HERNANDEZ, BROWNING & SHOWALTER, 8111 LBJ Freeway, Suite 1065, Dallas, Texas 75251. Garcia is joined as an interested-party defendant given her financial interest in the outcome of this coverage dispute.

II.
JURISDICTION AND VENUE

6. This Court has jurisdiction over this lawsuit under 28 U.S.C. § 1332(a)(1) because the plaintiff and the defendants are citizens of different states and the amount in controversy exceeds $75,000.

7. Venue is proper in the Northern District of Texas, Dallas Division, pursuant to 28 U.S.C. § 1391(b)(1) because Soto resides in that district and division and all of the defendants are residents of Texas within the meaning of 28 U.S.C. § 1391(c).

III.
BACKGROUND

A. The Policy

8. This is an insurance coverage case. At issue is a commercial general liability insurance policy issued by Evanston to Soto with policy number 3EA1504 with a policy period of May 8, 2015 to November 20, 2015 (the "policy"). The policy has a limit of $1 million per occurrence. A true and correct copy of the policy is attached hereto as Exhibit A.

B. The Underlying Lawsuit

9. Both Soto and Alden Roofing have requested defense and indemnity from Evanston under the policy in the lawsuit styled *Jose Valdez-Arevalo and Carolina Garcia vs. The Alden Roofing Company, LLC and Omar Soto*, Cause No. DC-16-01508, In the 116th District Court of Dallas County, Texas (the "underlying lawsuit"). A true and correct copy of the plaintiffs' live petition is attached hereto as Exhibit B.

10. On February 9, 2016, plaintiffs Jose Valdez-Arevalo and Carolina Garcia (collectively, the "plaintiffs"), filed the underlying lawsuit against Alden Roofing and Soto alleging three causes of action: (a) negligence, (b) gross negligence, and (c) negligence per se. The live petition, Plaintiff's Third Amended Petition, was filed on June 23, 2016.

11. Soto tendered the underlying lawsuit to Evanston for defense and indemnity. Alden Roofing also tendered the underlying lawsuit to Evanston for defense and indemnity, claiming to be an additional insured under the policy and/or owed coverage under the policy under the subcontract agreement between it and Soto. Evanston has agreed to defend Soto subject to a reservation of rights. Evanston is not currently defending Alden Roofing because it has been nonsuited and is no longer a party to the underlying lawsuit.

IV.
COUNT 1: CLAIM FOR DECLARATORY JUDGMENT AGAINST SOTO

12. Pursuant to 28 U.S.C. § 2201, Evanston seeks a judicial declaration that it has no duty to defend and no duty to indemnify Soto in the underlying lawsuit because coverage is precluded by the exclusions for employer's liability and bodily injury to contractors and subcontractors. The exclusions state:

> This insurance does not apply to:
>
> * * *
>
> e. Employer's Liability
>
> "Bodily injury" to:
>
> (1) An "employee", "volunteer worker" or "temporary worker" [the definition of which includes workers hired "to meet seasonal or short-term needs"] of the Named Insured arising out of and in the course of:
>
> (a) Employment by the Named Insured; or
>
> (b) Performing duties related to the conduct of the Named Insured's business;
>
> * * *
>
> This exclusion applies whether the insured may be liable as an employer or in any other capacity and to an obligation to share damages with or repay someone else who must pay damages because of the injury.
>
> This exclusion applies to any liability assumed under an "insured contract".
>
> * * *
>
> Bodily Injury to Contractors or Subcontractors
>
> "Bodily injury" to any:
>
> (1) Contractor or subcontractor while working on behalf of any insured;

(2) Employee, volunteer worker, leased employee or temporary worker of such contractor or subcontractor; or

(3) Additional subcontractor, including employees, volunteer workers, leased employees or temporary workers of such contractor or subcontractor indicated in Paragraph (1) above.

This exclusion applies:

(a) Even if the claim against any insured alleges negligence or other wrongdoing in the:

(i) Selection, hiring or contracting;

(ii) Investigation;

(iii) Supervision or monitoring;

(iv) Training; or

(v) Retention

of any contractor or subcontractor for whom any insured is or was legally responsible and whose acts or omissions would be excluded by Paragraph (1), (2) or (3) above.

(b) Whether the insured may be liable as an employer or in any other capacity;

(c) To any obligation to share damages with or repay someone else who must pay damages because of the injury; and

(d) To liability assumed by the insured under an "insured contract".

13. These exclusions apply to negate any duty to defend because Valdez-Arevalo alleges that Soto "hired [him] to work on the date of the incident as a temporary worker" and that he was injured while "working as a temporary worker for Defendant [Soto]." They would also apply to negate any duty to defend were Valdez-Arevalo to assert that he was working as a "subcontractor" or "seasonal worker" or as Soto's "employee." These exclusions similarly negate the possibility that Evanston will ever have a duty to indemnify because "the same

reasons that negate the duty to defend likewise negate any possibility [Evanston] will ever have a duty to indemnify."[1] Accordingly, Evanston has no duty to defend or indemnify Soto in the underlying lawsuit.

V.
COUNT 2: CLAIM FOR DECLARATORY JUDGMENT AGAINST ALDEN ROOFING

14. Pursuant to 28 U.S.C. § 2201, Evanston seeks a judicial declaration that it has no duty to defend and no duty to indemnify Alden Roofing in the underlying lawsuit, which seeks coverage under the policy by two avenues: (a) as an additional insured under the policy; and/or (b) the indemnification provision in the subcontract agreement between Alden Roofing and Soto.

A. Additional Insured

15. The policy includes an additional insured endorsement. It states, in relevant part:

> **SCHEDULE**
>
> Person or Entity: The Alden Roofing Company, LLC
>
> * * *
>
> **WHO IS AN INSURED** is amended to include the person or entity shown in the Schedule above as an Additional Insured under this insurance, but only as respects negligent acts or omissions of the Named Insured and only as respects any coverage not otherwise excluded in the policy. . . .
>
> When coverage does not apply for the Named Insured, no coverage or defense shall be afforded to the Additional Insured.

16. The endorsement very clearly states, however that "[w]hen coverage does not apply for the Named Insured," here Soto, "no coverage or defense shall be afforded to the Additional Insured." The policy similarly states, under Section II – Who Is An Insured, that

[1] *See Farmers Tex. Cnty. Mut. Ins. Co. v. Griffin*, 955 S.W.2d 81, 84 (Tex. 1997).

"[w]hen coverage does not apply for the Named Insured, no coverage or defense shall be afforded to any Additional Insured under this policy." As shown in Count 1 above, there is no coverage for Soto so, as a result, there is no coverage for Alden Roofing as an additional insured. Accordingly, Evanston has no duty to defend or indemnify Alden Roofing in the underlying lawsuit.

B. Indemnification Provision

17. The subcontract agreement, a complete copy of which is attached hereto as Exhibit C, includes the following indemnification provision (the "indemnification provision"):

> 6. Indemnification. To the fullest extent permitted by law, the Subcontractor [Soto] will defend, indemnify and hold harmless the Company [Alden Roofing] and its agents and employees from and against any and all claims, damages, losses and expenses, including but not limited to attorney's fees, arising out of or resulting from Subcontractor's performance of Work under this Agreement, including the negligent acts or omissions of the Subcontractor, the Subcontractor's subcontractors, anyone directly or indirectly employed by them, or anyone for whose acts they may be liable, **regardless of whether or not such claim, damage, loss or expense is caused in part by Company, its agents or employees.**

18. Evanston seeks a judicial declaration that it has no duty to defend Alden Roofing pursuant to this indemnification provision because coverage is precluded by the exclusion for contractual liability. The exclusion states:

> This insurance does not apply to:
>
> * * *
>
> b. Contractual Liability
>
> "Bodily injury" for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement. This exclusion does not apply to liability for damages:
>
> (1) That the insured [Soto] would have in the absence of the contract or agreement; or

> (2) Assumed in a contract or agreement that is an "insured contract" . . . .

19. This exclusion applies to preclude coverage because the indemnification provision purports to obligate Soto to pay damages for liability assumed therein and neither exception applies. Soto would have no purported obligation to defend and indemnify Alden Roofing in the absence of the indemnification provision, and the subcontract agreement including this indemnification agreement is not an "insured contract," which the policy defines as follows:

> "Insured contract" means:
>
> a. A contract for a lease of premises. . . . ;
>
> b. A sidetrack agreement;
>
> c. Any easement or license agreement, except in connection with construction or demolition operations on or within 50 feet of a railroad;
>
> d. An obligation, as required by ordinance, to indemnify a municipality, except in connection with work for a municipality;
>
> e. An elevator maintenance agreement.

20. This exclusion similarly negates the possibility that Evanston will ever have a duty to indemnify because "the same reasons that negate the duty to defend likewise negate any possibility [Evanston] will ever have a duty to indemnify."[2] Accordingly, Evanston has no duty to defend or indemnify Alden Roofing in the underlying lawsuit.

VI.
JURY DEMAND

21. Evanston demands a trial by jury on all issues of fact, if any.

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[2] *See Griffin*, 955 S.W.2d at 84.

VII.
PRAYER

22. For these reasons, Plaintiff Evanston Insurance Company, successor by merger to Essex Insurance Company, respectfully prays that the Court enter a declaratory judgment establishing that it has no duty to defend or indemnify Defendant Omar Soto or Defendant The Alden Roofing Company in the lawsuit styled *Jose Valdez-Arevalo and Carolina Garcia vs. The Alden Roofing Company, LLC and Omar Soto*, Cause No. DC-16-01508, In the 116th District Court of Dallas County, Texas. Evanston further prays that the Court award Evanston its costs of court and for such other and further relief to which Evanston may be justly entitled.

Respectfully submitted,

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